84-158

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ROCKY B. FISHERIES, INC.,
an Oregon Corporation,
JOHNNIE BROWN and DAVID BROWN,
Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC.,
an Oregon Corporation;
JOHN DUDREY with his law firm partners
FLOYD A. FREDRICKSON, LLOYD W.
WEISENSEE, PETER C. McCORD and JAY M.
FOUNTAIN; LAWRENCE F. FINNERAN with
his law firm partners JERRY O. LESAN and
KIRK JOHANSEN,
Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

JURISDICTIONAL STATEMENT

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7/20/84

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QUESTION PRESENTED

An Oregon statute allows the summary, ex parte, pre-judgment seizure of fishing boats which are the source of fisherman's livelihood for non-admiralty, original construction liens without any:

a) pre-seizure notice;
b) pre-seizure hearing;
c) extraordinary situations existing;
d) a writ being issued by a judge;
e) sworn affidavits of the claimant;
f) post-seizure hearing; or
g) adequate bond being posted.

The question is whether such process violates due process rights under the Fourteenth Amendment to the Constitution of the United States.

LIST OF PARTIES

The caption contains the names of all parties to the proceedings.[1] However, 28 U.S.C. § 2403(b) may be applicable and this brief will be served on the Attorney General of Oregon.

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[1]Appellants Johnnie Brown and David Brown, Oregon fishermen, are the sole shareholders of Rocky B. Fisheries, Inc., an Oregon corporation, which has no parent company, subsidiary or affiliate.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Rocky B. Fisheries, Inc., an Oregon corporation, Johhnie Brown and David Brown,

Appellants,

v.

North Bend Fabrication & Machine, Inc., an Oregon corporation; John Dudrey with his law firm partners Floyd A. Fredrickson, Lloyd W. Weisensee, Peter C. McCord and Jay M. Fountain; Lawrence F. Finneran with his law firm partners Jerry O. Lesan and Kirk Johansen,

Appellees.

ON APPEAL FROM THE
OREGON COURT OF APPEALS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Rocky B. Fisheries, Inc., Johnnie Brown and David Brown appeal from the

judgment of the Court of Appeals of the State of Oregon, holding that Oregon's boat construction lien statutes (Or. Rev. Stat. 783.010 to 783.090) are constitutional and not violative of appellants' due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Oregon Court of Appeals, which appears in the appendix hereto, pp. A-1 to A-38, infra, is reported at 66 Or. App. 625, 676 P.2d 319 (1984).

The trial court's order and judgment dated June 14, 1982 are not reported. They are reprinted in the appendix hereto, pp. A-39 to A-47, infra.

GROUNDS OF JURISDICTION

Rocky B. Fisheries and its two shareholders, Oregon commercial fishermen, brought an action at law for damages

under 42 U.S.C. § 1983, challenging the in rem and ex parte seizure of their fishing boat pursuant to Or. Rev. Stat. 783.010 to 783.090.[2] Appellants contended that the seizure was accomplished without due process of law and attacked the constitutionality of Oregon's boat construction lien statutes. The Oregon Court of Appeals upheld the challenged statutes, affirming the trial court's judgment which granted North Bend's motion for summary judgment and the individual appellees' motion to dismiss.

This Court has jurisdiction by appeal pursuant to 28 U.S.C. § 1257(2). The Oregon Court of Appeals filed its opinion on January 25, 1984. See p. A-2, infra. Appellants' petition for review

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[2]Appellants also sought recovery under theories of conversion, abuse of process and interference with contractual relations.

was denied by the Oregon Supreme Court on April 24, 1984. 297 Or. 82 (1984). See pp. A-38 to A-39, infra. A notice of appeal to this Court was timely filed with the Oregon Court of Appeals and duly served on all parties on June 20, 1984. See pp. A-47 to A-49, infra. A copy was served on the Oregon Supreme Court, which was possessed of the record, on June 21, 1984.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. * * *"

Oregon Statutes:

The full text of the relevant Oregon statutes, Or. Rev. Stat. 783.010 to 783.170, is set forth in the Appendix (pp. A-50 to A-55, infra). The statutory provisions most directly at issue in this appeal include the following:

Or. Rev. Stat. 783.010:

> Every boat or vessel used in navigating the water of this state or constructed in this state is liable and subject to a lien:
>
> * * * *
>
> (2) For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or with any person having them employed to construct, repair or launch such boat or vessel, on

account of labor done or materials furnished by mechanics, tradesmen or others in the building, repairing, fitting and furnishing or equipping such boat or vessel, or on account of stores and supplied furnished for the use thereof, or on account of premiums for insurance placed on or with respect to such boat or vessel, or on account of launchways constructed for the launching of such boat or vessel.

* * * *

Or. Rev. Stat. 783.030:

Any person having a demand as mentioned in ORS 783.010, instead of proceeding for recovery thereof against the master, owner, agent or consignee of the boat or vessel, may at his option commence an action against such boat or vessel by name.

Or. Rev. Stat. 783.040:

Any person wishing to commence an action against a boat or vessel shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which the boat or vessel may lie or be. The complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued, and shall be verified by the plaintiff or some credible person for him.

Or. Rev. Stat. 783.050:

> Whenever the complaint is filed, the clerk shall issue a warrant thereon, commanding the sheriff to seize the boat or vessel mentioned in the complaint, with her tackle, apparel, and furniture and retain the same until discharged from such custody by due course of law.

STATEMENT OF THE CASE

Appellants Johnnie and David Brown are Oregon commercial fishermen. Their $600,000 boat the Rocky B. was constructed in Oregon, was launched November 24, 1979 and was documented and licensed as a boat on November 27, 1979. North Bend supplied services and materials after the boat was launched, from December 13, 1979 to May 6, 1980. An outstanding balance of $5,410.04 was due when North Bend through its attorneys claimed a nonmaritime lien on the boat pursuant to Or. Rev. Stat. 783.010(2), claiming that labor and material were provided in

connection with the original construction of the boat.

On August 1, 1980, the ex parte, in rem seizure of the Rocky B. occurred. North Bend filed a complaint and warrant for the arrest of the boat. The complaint, which was not supported by affidavits, consisted of mere conclusory allegations. The complaint did not allege any "extraordinary circumstances" to justify summary seizure. North Bend posted a $10,000 bond on the $600,000 boat. The bond was to protect the county sheriff against wrongful seizure, not to protect appellants. With no pre-seizure notice or hearing of any nature whatsoever being afforded appellants, the clerk of court issued a warrant based upon the conclusory allegations in the complaint, and the county sheriff seized the vessel. Immediately after the seizure, appellants requested release of the Rocky B., but

North Bend refused. The seizure of the Rocky B. deprived appellants of their ability to earn their livelihood.

Rocky B. Fisheries and its two shareholders filed suit challenging the seizure of the Rocky B., alleging in their complaint that the seizure constituted a violation of their civil rights (42 U.S.C. § 1983). The trial court granted the individual appellees' motion to dismiss for failure to state facts sufficient to constitute a claim and North Bend's motion for summary judgment, holding the challenged seizure procedures and statutes constitutional.[3]

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[3]The resulting judgment dismissed all claims except one; that the seizure of the boat was illegal because the Oregon court lacked jurisdiction since jurisdiction vested exclusively in the federal courts. The judgment articulates that there is no just reason for delay, and appellants' appeal was taken pursuant to Or. R. Civ. P. 67B.

Appellants appealed, and the Oregon Court of Appeals affirmed. See pp. A-1 to A-38, infra. The Court of Appeals held that due process rights under the Fourteenth Amendment to the United States Constitution do not apply to the prejudgment seizure of a boat, even in an admittedly non-admiralty context, since "The Sniadach [Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969)] line of cases . . . are inapposite to the seizure of a vessel under ORS 783.030 et seq. . . ." Rocky B. Fisheries v. No. Bend Fab., 66 Or. App. 625, 634, 676 P.2d 319 (1984), (A-25, infra). The Court of Appeals held that the boat owners' only right, when there is an ex parte summary seizure of the boat which is the source of their livelihood, is to a judicially-legislated, post-seizure hearing, which the boat owner must request, although he has

not notice of any such right.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents important and substantial federal questions concerning the constitutional prerequisites for the prejudgment seizure of property, which seizure deprives the owners of their ability to earn their livelihood.

It cannot be emphasized too strongly that this is not an admiralty case. Oregon courts have no admiralty jurisdiction because such jurisdiction is vested solely and exclusively in the federal courts. All parties to this case agree that the lien at issue is a non-admiralty lien. It is a lien claimed by defendants to be for the original construction of a boat.

Notwithstanding the due process developments over the past few decades, the Oregon Court of Appeals has held that

due process rights under the Fourteenth Amendment to the United States Constitution do not apply to the prejudgment seizure of a fishing boat. The Court of Appeals has held, in resurrecting an illogical nineteenth century legal principal, that seizure of one's property is sufficient notice to satisfy constitutional law requirements. Also, the Oregon court has held that no pre-seizure hearing is required. The Court of Appeals has held that the owners' only right, when there is an ex parte summary seizure of the boat which is the source of their livelihood, is to a judicially-legislated, post-seizure hearing notwithstanding that: a) the statutes provide for no such hearing; b) the boat owners are given no notice of such hearing and; c) for any such hearing to occur it must be requested by the boat owner.

Under the Court of Appeals' decision, there are no safeguards to prevent mistake in seizure. A creditor can present a complaint consisting of mere conclusory allegations, unsupported by affidavits, and have a writ issued without any prior notice or hearing to the owner and with no meaningful judicial participation in the writ. The complaint need not even allege an "extraordinary situation"[4] to justify summary sei-

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[4]This Court outlined the "extraordinary situations" exception in Fuentes v. Shevin, supra:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 U.S. [371], at 379 [91 S. Ct. 780, at 786, 26 L.Ed.2d 113]. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a

zure. The Court of Appeals has rewritten the law of due process in this state, contrary to multiple U.S. Supreme Court decisions which establish plaintiffs' rights. See, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 1895 (1974); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349

(n. 4 cont.)

> special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 90-91 [92 S. Ct. at 1999-2000]. (Footnotes omitted.)

(1969). The Oregon court has ignored these binding precedents.

The Court of Appeals held that due process rules do not apply to an in rem state court seizure of tangible personal property when the purpose of the seizure is to create a lien. This holding is inconsistent with the rule of Sniadach and its progeny. As recognized by this Court, whenever an owner is deprived of the use of his property during the pendency of litigation, due process requires prior notice and prior hearing regardless whether jurisdiction is in rem or in personam. The Oregon court ignores Green v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, ____ L.Ed.2d ____ (1982) which holds:

> '[A]ll proceedings, like all rights, are really against persons.' In this case, appellees have been deprived of a significant interest in property . . . In light of this deprivation, it will not suffice to recite that because an action is in

> rem, it is only necessary to serve notice upon the thing itself." 102 S. Ct. at 1878-1879.

This Court consistently has extended due process protections to actions based on in rem jurisdiction. See Green, supra; Sniadach, supra.

There is no logical basis for distinguishing a fisherman's boat from any other type of tangible personal property in regard to notice requirements. The Oregon Court of Appeals, in deciding that prior notice is not required where the purpose of the seizure is the perfection of a lien, made the following startling statements:

> "Despite the fact that notice by seizure has been criticized of late, it is particularly appropriate in the seizure of a seagoing vessel, the identity or whereabouts of whose owners may be unknown, or whose owners may be outside the jurisdiction * * * * [I]f prior notice were required, it would in many instances enable the owner to frustrate the perfection of the lien and its priority by putting out to sea or alienating the vessel." Rocky B.

Fisheries, supra, 66 Or. App. at 632 (A-19 to A-20, infra).

The analysis is in error for several reasons. Oregon law does not create a lien on a "seagoing vessel." The Victorian, 24 Or. 121, 32 P. 1040 (1893). This is because admiralty liens are solely and exclusively cognizable under federal admiralty law. Even if it did, the potential for frustration of a lien does not justify inadequate notice. Moreover, the Court of Appeals mires itself in illogic because there is no basis for distinguishing a fishing boat from any form of movable personal property, some of which, such as airplanes, are far more rapidly transported.

From a due process standpoint, the key question is the extent of interference with one's property, not the potential for frustration of the attachment. The seizure of a commercial fishing

vessel is analogous to the garnishment of wages, in that both impose a tremendous hardship on wage earners with families to support. As this Court has held in regard to garnishment of wages:

> "Where the the taking of one's property is so obvious, it needs no extended argument to conclude that absent prior hearing this prejudgment garnishment procedure violates fundamental principles of due process." (Citations omitted.) Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1960).

The Oregon court attempts to de-emphasize the impact of the interference with property in this case by analogizing the seizure of a fishing boat with the filing of a construction lien. The analogy is inappropriate, as the Court of Appeals comes close to recognizing later in its opinion: "filing a lien against real property is not quite as drastic as seizing a vessel. * * * The analogy is by no means complete * * *." Rocky B.

Fisheries, supra, 66 Or. App. at 631 (A-15 to A-16, infra). When a construction lien is filed against real property, the only harm to the owner is the restraint on alienation. The owner is not deprived of the use of the property during the pendency of the litigation. The owner retains the full use and enjoyment of the premises. However, when a fishing boat is seized, not only is there a restraint on alienation, the owner is deprived of the use and enjoyment of the vessel. When the vessel is a commercial fishing vessel, the owner loses the ability to earn his or her livelihood. Such a drastic remedy, allowed before judgment, requires all of the procedural protections provided by the Fourteenth Amendment.

The Court of Appeals' reasoning in validating a patently unconstitutional statutory scheme was to incorporate into

Oregon law the unique principles of federal admiralty law. The Court of Appeals followed Merchants National Bank v. Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. dis. 456 U.S. 966, 102 S. Ct. 2263 (1982) in which the Fifth Circuit upheld the constitutionality of Federal Admiralty Rules C and E, which permit the in rem seizure of seagoing vessels for enforcement of federal maritime liens.

Federal admiralty law is unique and is not relevant to a state lien statute which purports to allow seizure of boats for original construction liens. Oregon has no admiralty law jurisdiction. The Victorian, 24 Or. 121, 32 P. 1040 (1893). The reasons for permitting ex parte, in rem seizures under federal admiralty law do not apply to Oregon's boat construction lien statute. The risks attendant to one supplying labor or materials to a

foreign vessel which may be in port for only hours are different from the risks attendant to one supplying labor or materials for a boat under construction, which is obviously not sailable. Admiralty law deals with seagoing vessels once complete, Oregon law deals only with vessels under construction in Oregon.

Federal admiralty law, as presented to the Fifth Circuit in Merchants, supra, provides far greater due process protections than Oregon's boat construction lien law. The court in Merchants emphasizes that Admiralty Rules C and E are, in conjunction with the local rules, constitutional because they provide minimal due process safeguards. Of key importance to the court was Local Admiralty Rule 21, in the United States District Court for the Western District of Louisiana, which specifically guaranteed a prompt post-seizure hearing and thus

provided an opportunity to strike down an improper attachment. Merchants, supra, 663 F.2d 1344. That rule provided:

> Whenever there is an arrest in rem or whenever property is attached, the party arrested or any person having the right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant, be entitled to an order requiring the libellant to show cause instanter why the arrest or attachment should not be vacated. Merchants, supra, 663 F.2d at 1344.

The rule specifically provides for an "instanter" hearing, and shifts the burden to the lien claimant to show cause why the arrest or attachment should not be vacated.[5]

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[5]This Court need not reach any admiralty law questions in the instant case. The only reason admiralty law is discussed is because the Court of Appeals erroneously applied admiralty law principles to purely local seizure statutes in its efforts to find such statutes constitutional.

No such provisions are found in Oregon's construction lien statutes (Or. Rev. Stat. 783.010 to 783.090), although the Court of Appeals attempted to engraft onto Or. Rev. Stat. 783.090[6] such provisions. However, Or. Rev. Stat. 783.090 merely allows the owner to have the vessel released if he posts a bond. There is no provision for a hearing to contest the validity of the seizure.[7]

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[6]Or. Rev. Stat. 783.090 states that the owner may secure immediate release of the vessel by entering into "an undertaking in favor of plaintiff, with sufficient security, to be approved by the judge or clerk of the court in which the action is pending."

[7]The Court of Appeals practices understatement in noting that the statutory "section may not articulate the procedure to be followed as completely as we might desire." Rocky B. Fisheries, supra, 66 Or. App. at 633 (A-21, infra).

There is not even a provision for the owner to file affidavits or evidence contesting the seizure. The burden of proof is not shifted to a lienor to establish the validity of the seizure.

In addition, there is no mechanism of any nature whatsoever to advise an owner that he has any right to a hearing. There is no way that the owner of a seized boat would ever know of the bond statute unless he read ORS 783.090. The owner is served with no papers at all which advise him that a hearing can occur. The contention that this bond

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(n. 7 cont.)

Being "bound to uphold the constitutionality of legislation when it is reasonably susceptible to an interpretation that will permit it" (66 Or. App. at 633 (A-21 to A-22, infra)), the Court of Appeals engaged in judicial legislation.

statute provides a hearing for the owner is illogical and illusory.[8]

The need for a hearing is graphically illustrated by the facts of the instant case. The seizure complaint filed in the Coos County Circuit Court by North Bend alleged that the materials were provided from December 13, 1979 to May 6, 1980. The Rocky B. was launched, documented and licensed by November 27, 1979. If a hearing had occurred, and the court had reviewed the pleadings, the court could have learned that all of the materials were provided after the Rocky B. was launched, documented and licensed.

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[8]The Oregon court chides appellants for not "attempt[ing] to avail themselves of that procedure." Rocky B. Fisheries, supra, 66 Or. App. at 634 (A-23, infra). In so doing the Oregon court chides appellants for being unaware of a procedure which did not exist before the court had an opportunity to "construe" 66 Or. App. at 634 (A-22, infra) the existence of that same procedure.

Oregon has no legal authority to seize a vessel for materials and supplies provided to an already constructed and seagoing vessel. The Victorian, supra. Therefore, the court would have immediately released the Rocky B. from seizure.[9]

CONCLUSION

The decision of the Oregon Court of Appeals repudiates fundamental due process principles. The questions presented

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[9]The Court of Appeals, in validating a harsh and unconstitutional remedy, fails to recognize that Oregon law provides creditors with an alternative lien remedy, which is constitutional and simple. This alternative lien remedy is a non-possessory chattel lien which fully protects the creditor, and provides notice and hearing to a boat owner. Also, this alternative remedy would permit seizure, pursuant to Or. Rev. Stat. 29.020 to 29.075, pp. A-50 to A-64, infra, (now Or. R. Civ. P. 81-85), pp. A-64 to A-77, infra, if extraordinary situations existed, such as a specific threat that the boat would be removed from this state.

by this appeal are substantial. Rocky B. Fisheries and its two shareholders urge this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

DATED this 20th day of July, 1984.

Respectfully submitted,

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